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No. A-231

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In The

Supreme Court of the United States

October Term, 1991

MILDRED BANKS, *Petitioner,*

v.

UNITED STATES POSTAL SERVICE
AND
POSTMASTER GENERAL WILLIAM F. BOLGER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDICES -

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT, IN AFFIRMING THE DECISION OF THE TRIAL COURT THAT, ON THE BASIS OF THE CIVIL SERVICE REFORM ACT OF 1978 AND CASES DECIDED PURSUANT THERETO, IT LACKED THE SUBJECT MATTER JURISDICTION OVER PETITIONER'S HANDICAPPER'S CLAIM THAT AROSE IN 1977, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WAS CLEARLY ERRONEOUS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was filed June 24, 1991 and is reproduced in the Appendix hereto at page A-1. The decision of the United States District Court for the Eastern District of Michigan, Southern Division, was issued on December 14, 1987, and is reproduced in the Appendix hereto at page B-1.

STATEMENT OF JURISDICTION

This matter was originally decided on December 14, 1987, pursuant to a Motion to Dismiss for lack of Subject Matter Jurisdiction granted in favor of Respondent, the United States Postal Service, by the United States District Court for the Eastern District of Michigan,

Southern Division. It was then appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court on June 24, 1991. Jurisdiction in this Honorable Court lies pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is an action which involves The Administrative Procedure Act, 5 USC § 701 *et seq.*; the Civil Rights Act of 1964, as amended, 42 USC § 2000e-16; the Postal Reorganization Act of 1970, 39 USC §§ 409(a), 1005(a)(1); the Rehabilitation Act of 1973, as amended, 29 USC §§ 791(b), 794; and the Civil Service Reform Act of 1978, 5 USC §§ 1101, 7501.

STATEMENT OF THE CASE

This was a civil action brought before the U.S. District Court for the Eastern District of Michigan, Southern Division, in which the Petitioner, in a *pro se* complaint filed on May 29, 1980, alleged in 1977 and 1978 that she had been subjected to illegal discrimination in her employment with the United States Postal Service on the basis of her sex, female, and race, black, and also because of her physical handicap, i.e., a disabling back injury.

Petitioner's complaint, as amended, came on for a bench trial on December 15, 1987. Her case was dismissed by the trial judge at the conclusion of her proofs pursuant to Respondent's Rule 41(a) Motion in which Respondent argued, essentially, that Petitioner had no right to pursue a claim based upon an allegation of discrimination on the basis of a handicap because: (a) she never filed a handicapper discrimination complaint as to her termination in 1978; (b) never exhausted her admin-

istrative remedies and therefore failed to meet necessary conditions precedent to create the subject matter jurisdiction necessary for the maintenance of her handicapper's action; and (c) was physically unable to handle her job when she was terminated.

Petitioner thereafter timely filed an appeal with the Sixth Circuit Court of Appeals. In a decision issued on June 24, 1991, the Sixth Circuit affirmed the lower court decision in an unpublished *per curiam* opinion. The affirmation was based upon the decision of this Honorable Court in *United States* v. *Fausto*, 484 U.S. 439 (1988), and also upon a ruling of the Sixth Circuit in *Parker* v. *United States Postal Service*, 859 F.2d 922 (6th Cir., 1988), which held, essentially, that based upon the Civil Service Reform Act of 1978, 5 USC §§ 1101 *et seq.*, the Court lacked subject matter jurisdiction over Petitioner's case and was therefore without jurisdiction to review her discharge, and that she did not have a nonstatutory right to judicial review of her discharge.

Facts

Petitioner received a competitive appointment to the United States Postal Service, effective March 11, 1967, with the entry job title of Substitute Distribution Clerk. Petitioner completed a 90-days probationary period on or about June 11, 1967. Aside from maternity leave in October of 1968, Petitioner worked largely without interruption or incident for approximately nine and a half ($9\frac{1}{2}$) years. Effective October 9, 1976, Petitioner was the successful bidder for a new position: OCR Operator PS-5, GPO Tour #3.

On January 17, 1977, while on duty in her new position, Petitioner sustained an injury to her left arm and shoulder while lifting a tray of mail. She reported the injury to her Supervisor who referred her for treatment

to a medical facility. She was examined and treated on the same date for her injury at an Industrial Clinic.

On February 18, 1977, plaintiff sustained an injury to her right hand and shoulder, which injury she also reported to her Supervisor. As with her prior injury, Plaintiff was examined and treated the same day at another Industrial Clinic.

On May 19, 1977, while lifting trays of mail at work, Petitioner injured her back in the lumbar region. She was transported to the emergency room at Sinai Hospital of Detroit where she was examined, diagnosed as suffering from a lumbar sprain,[1] treated, and released.

Petitioner took medical leave for the injury of May 19th, and remained off work from May 19th through June 2, 1977, at which time she returned to work on light duty. Petitioner remained on light duty from June 2, 1977, through June 14, 1977, at which time she resumed full duty despite her personal belief that she had not yet healed from the nagging back injury of May 19th, and was therefore not ready to return to full duty. Her own feelings and belief notwithstanding, she returned to her job and attempted to work with what was apparently a herniated disc in her lumbar region. She was unable to perform her duties, however, and went out again on June 15th, and remained off until June 20th.

[1] **The characterization "lumbar or back sprain" proved to have most unfortunate consequences for Petitioner, who became viewed by the Postal Service as a Malingerer because she continued to experience problems with her back over time. Since a lumbar or back sprain was a minor injury, at worst, or so Respondent's reasoning went, the Petitioner had no valid reason to continue missing time from work. To their way of thinking, she was making overly much of a minor injury. In fact, according to one John Gilroy, M.D., a Neurologist who later examined her, Petitioner had suffered a herniated or ruptured disc on May 19, 1977, which was simply misdiagnosed by other physicians who examined her.**

She returned to work on light duty on June 21, 1977, which status she held until August 22, 1977.[2]

Plaintiff went out again on August 23, 1977, and stayed off until August 31, 1977. She returned to work on light duty on September 1st and worked until September 26th, then she was off from September 27, 1977, until October 20, 1977. All of the time off, or on light duty, was due to the lingering effects of her back injury of May 19, 1977.

On October 21, 1977, she returned to work on full duty status and worked until November 1, 1977, but was unable to continue because of on-going problems with her back. Plaintiff returned to light duty on November 2, 1977, and worked until November 16, 1977, at which time she went out again. She returned to work on December 1, 1977, but reinjured her back on that same date, and therefore had to stop working again.

On December 8, 1977, Plaintiff filed for permanent light-duty by writing to her postmaster.

On December 29, 1977, Plaintiff was issued a Notice of Removal from the Postal Service, effective February 8, 1978, for the reason that she failed to meet the requirements of her position. Specifically the Notice alleged that from August 13, 1977, through December 29, 1977, Petitioner failed to report for duty as scheduled on no fewer than forty-two (42) occasions. The notice went on to state ". . . Your undependability in reporting and not being available for duty when needed and as scheduled

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[2] **On or about August 2, 1977, Plaintiff was examined by a Dr. A. T. Lozon on a referral from Respondent's medical service. Dr. Lozon, concluded that Plaintiff was sufficiently medically impaired to require light duty for a time. He found her able to work, but with restriction. In the interim, Plaintiff had been under the care of Walter Everett, M.D., an Orthopedist, who treated her for her back injury of May 19, 1977.**

indicates that you are unable to meet the requirements of your position."

Petitioner exercised her contractual right pursuant to the collective bargaining agreement between her union, and the United States Postal Service, and filed a grievance as to the removal. On February 8, 1978, a settlement of the grievance was reached, under the terms of which her time off while awaiting disposition of her grievance was: (a) converted into a long term suspension without pay; and (b) Petitioner was reinstated at the beginning of the first pay period following the execution of the settlement, or September 18, 1977.

Petitioner was instructed, in a letter dated September 1, 1978 from a Labor Relations Representative of the United States Postal Service, to report to work for her regular tour of duty no later than Monday, September 1, 1977, at 4:30 PM. The letter went on to state that if she was unable to report to work, that she was to submit ". . . current administrative medical evidence to Mr. Albert Vreeland, Supervisor of Tour III . . ." at the main post office on Fort Street, Detroit, Michigan.

Petitioner, who continued to have back problems and who remained under a Doctor's care, was unable to return to work. She therefore presented to a Mr. Vreeland, her shift supervisor, on September 1, 1978, a note from her treating physician, which note indicated that in his medical judgment, plaintiff was unable to resume her duties. Mr. Vreeland rejected the note as being *administratively unacceptable*, and placed Plaintiff on absent without official leave, i.e., AWOL status (emphasis added). On September 22, 1978, the Respondent issued a five-day letter to Petitioner, which said essentially that if she did not return to duty within five days or submit a satisfactory reason for her absence, she would be subject to disciplinary actions.

In response to the five-day letter, Respondent submitted another Doctor's Note, which Respondent again rejected.

On October 19, 1978, Respondent issued to Petitioner her 2nd Notice of Removal. The grounds given were: (a) that Petitioner had been AWOL since September 18, 1978; and (b) because she had failed to submit administratively acceptable evidence to substantiate her need for the absence, it was recorded as absence without official leave (AWOL).

By its terms, the notice was to be effective on November 30, 1978. The notice informed Plaintiff that she had the right to file a grievance under the National Agreement, i.e., collective bargaining agreement, between Petitioner's union and Defendant, within fourteen days of receipt of the notice, but omitted mention of any right to pursue redress under EEO laws or procedures.

Petitioner filed a grievance as to the proposed discharge. Under the terms of a proposed settlement, she was reinstated as an OCR Operator, effective September 18, 1978. On December 14, 1977, Petitioner filed an oral EEO complaint in which she alleged inter alia that she had been improperly denied light duty. When mediation proved unsuccessful, the complaint was reduced to writing on January 16, 1978. On March 23, 1978 Petitioner filed another EEO complaint, this one was to her Notice of Removal of December 29, 1977. The complaints were consolidated and heard jointly before an EEO complaints examiner on March 27, 1980, and a final agency decision finding no discrimination was adopted on April 29, 1980.

On October 19, 1978, Respondent issued a third Notice of Removal for Petitioner being AWOL during the

period of September 18, 1978 through October 19, 1978. Petitioner was terminated on November 30, 1978. She filed an EEO complaint as to her termination.

Chronology of Attempts to Obtain Permanent Light Duty Status.

On May 19, 1977, while performing her duties at work Plaintiff sustained a back injury, which was initially characterized as a "back sprain" by the Emergency Room Physician at Sinai Hospital, who examined her on the date of her injury. Because the pain persisted, she consulted her physician the next day. He prescribed pain medication, and referred her to North Detroit General Hospital for out-patient treatment, which included traction four times a week. She was also instructed to wear a lumbar brace with posterior steel supports. During the summer and early fall of 1977, Petitioner attempted to work and would perform her duties, whether light or full, for a time but eventually would have to take medical leave. During the period from May 19, 1977, through December 31, 1977, Petitioner saw no fewer than four (4) doctors on behalf of the Petitioner.[3] She was under the care of an Orthopedist, and her own doctor, who recommended that she go on light-duty status.

1. *First Request* On September 17, 1977, Petitioner submitted her first request for permanent light duty. It was denied in a letter from the medical unit, dated September 23, 1977.

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[3] **The numerous referrals for a medical evaluation indicates that Respondent believed Petitioner to be a Malingerer. There are memoranda in Plaintiff's file, dated as early as May 20, 1977, which indicate that Petitioner's superiors did not believe that she was actually suffering from any back injury. On June 6, 1977, and again on June 8, 1977, such memoranda were directed to the Safety Section of the Detroit facility where Petitioner worked. The head of the Safety Section at this time was one James Pressell.**

2. *Second Request* On October 10, 1977, in a letter addressed to the Postmaster, Detroit, Petitioner reapplied for permanent light duty. On October 19, 1977, her reapplication was denied.

3. *Third Request* On December 8, 1977, Petitioner applied for permanent light duty a third time, with the same result; her application was denied, probably as much because of the negative attitude towards her then entertained and fostered by Mr. Pressell,[4] as for any other reasons.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS WAS CLEARLY ERRONEOUS IN AFFIRMING THE TRIAL COURT BECAUSE IT INCORRECTLY APPLIED TO PETITIONER CLAIM, THE CIVIL SERVICE REFORM ACT OF 1978, A STATUTE THAT DID NOT EXIST AT THE TIME THAT HER CLAIM AROSE IN 1977 AND WHICH HAD NO RETROACTIVE APPLICATION.

In deciding that the Petitioner did not have a right of judicial review of her discharge, the Court of Appeals

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[4] Apparently Mr. Pressell also believed that Petitioner was a Malingerer, because on November 25, 1977, he wrote a memo to Petitioner's tour supervisor in which he stated the following: "Ms. Banks must be treated and supervised very firmly. She should not be given any special consideration in her job." He closes by stating that ". . . if she is supervised correctly, the problem will eliminate itself." Evidently, Mr. Pressell had a say as to whether Petitioner received light duty or not, because there is a memo from him to a Mr. Adams, a Personnel Officer, suggesting that Mr. Adams deny Appellant's request for light duty. As further evidence of Respondent's attitude towards Petitioner, note that on February 10, 1978, Mr. Pressell wrote a letter to one Julia K. Bannerman, Claims Examiner, Office of Federal Workers Compensation Programs, in which he stated regarding Mrs. Banks as follows: "This employee is considered a Worker's Compensation abuser by this office and *is treated accordingly* (emphasis added)." Mr. Pressell went on to say ". . . I personally feel she is a Malingerer, who is giving the doctors a good story. The only way to get to the bottom is for us to work together and straighten out her act."

cited a line of Appellate Court decisions for the proposition that "nonpreference eligible Postal Service employees have neither a statutory nor nonstatutory right to judicial review of adverse personnel actions." In other words, the court lacked subject matter jurisdiction. *Yokum* v. *United States Postal Service*, 877 F.2d 276, 278 (4th Cir., 1989); *Royals* v. *Tisch*, 864 F.2d 1565, 1567-68 (11th Cir., 1989); *Diaz* v. *United States Postal Service*, 853 F.2d 5, 7-9 (1st Cir., 1988); *Witzkowske* v. *United States Postal Service*, 848 F.2d 70, 71-73 (5th Cir., 1988); the Court of Appeals cited *Parker* v. *United States Postal Service*, 859 F.2d 922 (6th Cir., 1988), as authority in the Sixth Circuit. And for the coup de grâce, it cited *United States* v. *Fausto*, 484 U.S. 439; 108 S.Ct. 668 (1988).

With all due respect, Petitioner contends that all of the authorities cited by the Court of Appeals in support of its conclusion are inapposite, and provide no support whatsoever for the Court's decision in affirmance because the Civil Service Reform Act of 1978, and cases decided pursuant thereto, upon which the Court of Appeals wholly relied, did not take effect until ninety days after October 13, 1978, or on or about January 14, 1979.[5] Whereas, Petitioner's claim arose on May 19, 1977, or at the latest, December 1, 1977 when she sustained a second injury at work.

The Civil Service Reform Act of 1978 had no retroactive application; and therefore, it cannot possibly have any bearing on a claim that arose in 1977. *Fausto*, on the other hand, involved a claim which arose in November of 1980, or at a time when the Civil Service Reform Act was indisputably in effect. Thus, *Fausto* can

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[5] **"Effective Date. Sec. 907. Except as otherwise provided in this Act, the provisions of this Act shall take effect ninety (90) days after the date of the enactment of this Act."**

5 USC §1101.

be distinguished on its facts, as can *Yokum* v. *United States Postal Service*, which arose from an event occurring in 1986. Similarly, in *Royals*, the events giving rise to the claim occurred between 1981 and 1984; in *Diaz*, the events occurred in 1984; in *Witzkowske*, the events giving rise to the claim occurred in 1984. Therefore, every case relied upon by the Court of Appeals can be distinguished on their facts from the Petitioner's claim. Each one suffers from the same defect, which is, that the relevant events or omissions occurred AFTER the Civil Service Reform Act went into effect in January 1978, rather than, as they did in the case at bar, PRIOR to the effective date of the Act. Therefore, neither the Act nor the cited cases are relevant.

The line of cases cited by the Court of Appeals as authority for its affirmance are inapposite to the case at bar, and cannot stand as authority for its decision.

II.

SINCE THE STATUTE AND CASES RELIED UPON BY THE COURT OF APPEALS TO AFFIRM THE LOWER COURT'S DENIAL OF PETITIONER'S CLAIM TO A NONSTATUTORY RIGHT OF JUDICIAL REVIEW OF HER DISCHARGE WERE INAPPOSITE, THE BODY OF LAW GOVERNING HER CLAIM TO REVIEW WAS THE TRADITIONAL BODY OF LAW THAT EXISTED PRIOR TO JANUARY 14, 1978, THE EFFECTIVE DATE OF THE CIVIL SERVICE REFORM ACT OF 1978.

The events giving rise to Petitioner's claim occurred in 1977, well before the date in January 1979, when the statute upon which the Court of Appeals relied became effective, 5 USC § 1101. Therefore, the law which governed the Petitioner's claim was that traditional body of law developed under the common law presumption in favor of judicial review of adverse actions against Postal Service employees, both under the Postal Reorganiza-

tion Act of 1970, *Peoples Gas, Light & Coke Company* v. *United States Postal Service*, 658 F.2d 1182, 1190-1191 (7th Cir., 1981), or earlier civil service regulations, *Burns* v. *United States Postal Service*, 380 FSupp. 623, 626-627 (1974).

This presumption of judicial review of adverse personnel actions operates strongly in Petitioner's favor and can only be overcome by the Respondent making a clear showing that Congress intended in the Postal Reorganization Act of 1970 to preclude judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140; 87 S.Ct. 1507, 1151 (1967). The burden is on Respondent, not Petitioner, *Assoc. of Data Processing Service Organization, Inc.* v. *Camp*, 397 U.S. 150, 157; 90 S.Ct. 827, 828 (1970). Under the law as it existed in 1977 when the claim arose, such a showing is impossible. Therefore, the Petitioner enjoyed the right to judicial review of Postal Service adverse personnel actions to determine whether they were arbitrary, capricious or abusive of discretion.

Petitioner presented to her EEO Counselor on or about December 14, 1976, and complained that she was being discriminated against in her employment on a number of grounds, including her handicapped condition. The EEO Counselor never acted on Petitioner's handicappers complaints because she did not believe that handicappers claims were within her purview. (T.104) At trial she testified that she had not been trained in processing handicappers claims and so, in effect, ignored them.

The posture of Respondent's EEO counselors was unlawful at the time because handicapped Federal employees had a right of judicial review in December 1977 when the Petitioner met with Respondent's EEO counselor concerning her claim. *Shirey* v. *Devine*, 670 F.2d 1188, 1197 (D.C. Cir., 1982), citing *Ryan* v. *Federal*

Deposit Insurance Corp., 565 F.2d 762, 763 (D.C. Cir., 1977); *McNutt* v. *Hills*, 426 FSupp. 990 (1977).

Historically, Postal Service employees enjoyed a non-statutory right to judicial review of adverse personnel actions, *Neal* v. *United States Postal Service*, 468 FSupp. 958 (1979); *Withers* v. *United States Postal Service*, 417 FSupp 1 (1976); *Burns* v. *United States Postal Service*, 380 FSupp 623 (1974), which adverse actions included employment discrimination claims based upon physical handicap. *Neal*, *supra*. This right was well developed and clearly recognized at the time that Petitioner's claim arose. *Alsbury* v. *United States Postal Service*, 530 F.2d 852, 854-855 (9th Cir., 1976). In fact, the right of Postal Service employees to judicial review of an adverse personnel action was so well understood by courts at the time when Petitioner's claim arose, that the Court in *Alsbury* made it a point to note that the transition from the old Post Office Department to the new United States Postal Service neither impaired the right of judicial review, nor altered the traditional standard for review.[6]

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[6] "Although the issue was not specifically argued on appeal, we note that the abolition of the Post Office Department and the creation of the Postal Service apparently did not alter the legal standards under which discharge proceedings are to be evaluated. 39 USC §2005(a)(1) provides that:

> 'Except as otherwise provided in this subsection, the provisions of chapter 75 of title 5 [5 USC §§7501-7533] shall apply to officers and employees of the Postal Service except to the extent of any [discrepancy] with — (A) the provisions of any collective-bargaining agreement negotiated on behalf of and applicable to them; or (B) procedures established by the Postal Service and approved by the Civil Service Commission.'

"The standards for discharge and the existing case law associated with 5 USC §7501 thus form an appropriate basis upon which this case may be decided. 5 USC §7501 provides in part that discharge may be 'for such cause as will promote the efficiency of the service.'"

Alsbury v. *United States Postal Service*, *supra* at 854.

In 1970, Congress transferred the responsibilities of the Post Office Department to a new agency, the United States Postal Service. The enabling legislation was the Postal Reorganization Act of 1970, 39 USC §§ 101 *et seq.*, which seemed to bar judicial review of Postal Service actions. But that impression is misleading. *Burns* v. *United States Postal Service*, *supra* at 627, stands for the proposition that although the Postal Reorganization Act barred judicial review of adverse personnel decisions under the APA, Petitioner nonetheless had a non-statutory right to the judicial review of adverse personnel actions, including one based upon her allegations of handicap discrimination.[7] *Neal* v. *United States Postal Service*, 486 FSupp 958 (1979). This right of judicial review was of ancient origin, *see, e.g., Eberlein* v. *United States*, 53 Ct.Cl. 466 (1918), *aff'd* 257 U.S. 82; 42 S.Ct. 12 (1921); *Hargett* v. *Summerfield*, 100 U.S. App. D.C. 85; 243 F.2d 29, 32 (D.C. Cir., 1957) and consisted of a two-pronged inquiry: Were the procedural requirements of

[7] The fact that the APA is not applicable, however, does not indicate a congressional desire to foreclose judicial review of action. The Supreme Court has repeatedly cautioned that "preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred." *Burns* v. *United States Postal Service*, 380 F.Supp. 623, 627 (1974), citing *Barlow* v. *Collins*, 397 U.S. 159, 166; 90 S.Ct. 832, 837 (1970) and that judicial review will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

> "*Abbott Laboratories* v. *Gardener*, 387 U.S. 136, 140; 87 S.Ct. 1507, 1511 (1967). There is nothing in the legislative history of the Postal Reorganization Act which suggests that Congress either impliedly or expressly intended to commit the subject matter of this suit entirely to the Postal Service's discretion. In fact, just the opposite conclusion may be inferred from the enactment of section 409 which grants original jurisdiction to the district court of all actions brought by or against the Postal Service except suits which seek judicial review of Postal rates." * * *
>
> Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L.Rev. 308, 321, 326 (1967).

the Statutes and Regulations complied with; and, Was the action of the Postal Service Officials arbitrary or capricious or not supported by substantial evidence?

There is no doubt but that prior to enactment of the Civil Service Reform Act of 1978, there existed in Petitioner's favor a nonstatutory right of judicial review of United States Postal Service adverse personnel actions to determine whether same were arbitrary, capricious or an abuse of discretion.

III.

THE 1978 AMENDMENTS TO THE REHABILITATION ACT OF 1974 CONFERRED UPON PETITIONER, A HANDICAPPED PERSON, A PRIVATE OR INDEPENDENT CAUSE OF ACTION AGAINST THE UNITED STATES POSTAL SERVICE FOR HER CLAIM IN WHICH SHE SET FORTH A SUFFICIENT FACTUAL BASIS FOR AN EMPLOYMENT DISCRIMINATION CLAIM BECAUSE OF HER HANDICAPPED CONDITION.

On May 19, 1977, although neither she nor Respondent fully realized it at the time, Petitioner ruptured a disc in her lower back while on duty lifting mail at her work station.[8]

Because her condition was consistently misdiagnosed as lumbar strain by both her own doctors and those of the United States Postal Service, it should occasion no surprise that the treatment regimen prescribed was unavailing. Notwithstanding the pain and discomfort, Petitioner attempted to work. On December 1, 1977, while at work, the Petitioner reinjured her back, and was unable to work at her normal duties thereafter.

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[8] **John Gilroy, M.D., a Neurosurgeon who examined the Petitioner, testified at trial that, in his opinion and based on her history, the Petitioner suffered a ruptured disc on May 19, 1977, which had been misdiagnosed by the other medical or osteopathic doctors who examined her since.**

The back injury from which the Respondent has suffered since May 19, 1977 is sufficiently disabling in its physical consequences to qualify her as a handicapped person within the meaning of the Rehabilitation Act of 1973, as amended in 1978. 29 USC §§ 791(b), 794. The 1978 amendments provided a ". . . private cause of action to persons subjected to handicap discrimination by the Federal Government and its agencies." *Gardner* v. *Morris*, 752 F.2d 1271, 1277 (8th Cir., 1985); *accord: Prewitt* v. *United States Postal Service*, 662 F.2d 292, 302 (5th Cir., 1981).

The amended Rehabilitation Act clearly extended it's reach to include the United States Postal Service. *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 302 (5th Cir., 1981).

> "Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in Section 501 and in Section 504, that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the Federal government and its agencies."

The effective date of the 1978 amendments was November 6, 1978, and §§ 501 and 505(a)(1), 29 USC §§ 791 and 794a(a)(1), applied retroactively to claims pending on that date. *Shirey* v. *Devine*, 670 F.2d 1118, 1197 (D.C. Cir., 1982).

> "Insofar as Section 505 refined and strengthened pre-existing rights, it applied retroactively to proceedings pending at the time it became effective. See *Bradley* v. *Richmond School District*, 416 U.S. 696, 711-715; 94 S.Ct. 2006, 2016-18 (1974); *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239; 8 L.Ed. 665 (1833); cf., e.g., *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 88 (4th

> Cir., 1978) (applying Section 505 retroactively to an action under Section 504). Section 505's incorporation of Section 717 of Title VII provides further reason to hold that the procedural aspects of Section 505 apply retroactively, because we reached the same conclusion about Section 717 after it was enacted in 1972. See *Womac* v. *Lynn*, 504 F.2d 267, 269 (D.C. Cir., 1974)."

The Petitioner had three EEO claims pending on November 6th, having filed on January 12th, 16th and March 23, 1978, which claims were not finally adjudicated administratively until March 1980. Therefore, the 1978 amendments reached back and encompassed the Petitioner's claims that she had been subjected to employment discrimination because of her handicap, i.e., back injury. Although the complaints that the Respondent's EEO counselors accepted from the Petitioner, had the race and sex boxes checked as the basis for her claim, both the body of the complaints and her affidavit of September 29, 1978, refer clearly to her medical problems and handicapped condition.

The reason that there is no handicapped box checked is simply that the Postal Service would not accept for processing a handicappers complaint at that time. In their parlance, a complaint or EEO charge which sought to raise a handicappers complaint with respect to adverse personnel actions was nonpurview, and therefore, simply unacceptable.

The Respondent testified at trial that she had fully explained to the EEO Counselors the facts with respect to her charges. Essentially, that after her back injuries of May 19, 1977 and December 1, 1977, she had been harassed by management, subjected to unwarranted discipline, and put at risk of termination from her job.

Her testimony on this point was uncontradicted. The EEO Counselors, in effect, simply ignored the Respondent's allegations that sounded a handicapper claim, and absolutely refused to cast them in the form of an administrative complaint which could be processed through the Postal Service EEO administrative scheme.

Although the Petitioner had a claim cognizable under the then extant body of Federal laws and regulation, *Shirey* v. *Devine*, 670 F.2d 1118, 1197 (D.C. Cir., 1982), as a practical matter, she had no where to go with it within her agency because the gate-keepers refused to deal with handicappers' allegations which they deemed to be nonpurview items. This refusal was a violation of the Petitioner's rights as a handicapped Federal employee under the Rehabilitation Act of 1973, which applied to the Postal Service at the time that her claim arose.

> "Preliminarily, however, we should observe that Section 501 requires affirmative action on the part of Federal agencies; unlike Section 504 of the Rehabilitation Act or Title VII of the Civil Rights Act, which usually requires only nondiscrimination. In *Ryan* v. *Federal Deposit Insurance Corp.*, 565 F.2d 762, 763 (D.C. Cir., 1977), the court held, and we agree, especially in light of the 1978 amendments, that Section 501 requires that Federal agencies do more than just submit affirmative action plans — § 501 'impose[s] a duty upon Federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion.'"
>
> *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 306 (5th Cir., 1981).

The 1978 amendments to the Rehabilitation Act of 1973 did more than apply retroactively to pending

charges, it ". . . incorporated by reference the provisions of § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e-16 (1982), as the exclusive vehicle for judicial remedy of claims of employment discrimination in Federal employment." *See* 29 USC § 794a(a)(1) (1982).

The pertinent section reads as follows:

> "The remedies, procedures and rights set forth in Section 711 of the Civil Rights Act of 1964 (42 USC 2000e-16 [Title VII]), including the application of Sections 706(f) through 706(k) (42 USC 2000e-5(f) through (k)), shall be available with respect to any complaint under [29 USC] Section 791 [Section 501] of this title . . ."

By virtue of the 1978 amendments, the Petitioner was entitled to have her then-pending EEO charges, which in terms raised handicappers allegations, considered or processed in accordance with established Title VII procedures and law. In short, the Petitioner had the right to an independent judicial review of the adverse personnel action to which she had been subjected because she was handicapped within the meaning of the Act. .

IV.

THE COURT HAD SUBJECT MATTER JURISDICTION UNDER THE POSTAL REFORM ACT, 39 USC §409(a) TO REVIEW PETITIONER DISCHARGE TO DETERMINE WHETHER IT WAS EFFECTED ARBITRARILY, CAPRICIOUSLY OR IN A MANNER THAT WAS ABUSIVE OF DISCRETION AS CONSTITUTING ILLEGAL DISCRIMINATION AGAINST A HANDICAPPED EMPLOYEE.

The power of a Federal Court to review adverse personnel actions of the Post Office to determine whether they were arbitrary, capricious or abusive of discretion has been exercised since at least 1918. *See, e.g., Eberlein*

v. *United States*, *supra*. This authority has been exercised directly, *Hargett* v. *Summerfield*, *supra*, or indirectly as in *Christian* v. *New York State Department of Labor*, 414 U.S. 614, 622, 94 S.Ct. 747, 751 (1975), where the Court noted that although the Post Office's decision was statutorily immune from review (the employee was probationary), judicial review was still permissible as to the agency's procedures to determine whether they were applied in an arbitrary or capricious manner. *Cioppa* v. *United States Postal Service*, 603 FSupp. 590, 592-3 (1984). Thus, at the time that the Petitioner's claim arose in 1977, a right of judicial review was found to exist in case after case: *see*, *e.g.*, *Burns* v. *United States Postal Service*, 380 FSupp. 623 (1974); *Withers* v. *United States Postal Service*, 417 FSupp. 1 (1976); *Oates* v. *United States Postal Service*, 444 FSupp. 100 (1978); and *Neal* v. *United States Postal Service*, 468 FSupp. 958 (1979).

The issue was litigated heavily in the Second Circuit, and as early as 1964, the Court of Appeals for that Circuit ruled in *McTiernan* v. *Gronouski*, 337 F.2d 31, 34 (2d Cir., 1964) that:

> "... the taking of disciplinary action against government employees, including invoking the sanction of dismissal, is a matter of executive discretion, and is subject to judicial supervision only to the extent required to insure 'substantial compliance with the pertinent statutory provisions provided by Congress (citations omitted) and to guard against arbitrary or capricious action (citations omitted)."

The holding in *McTiernan* was followed in the Second Circuit in *Grebosz* v. *U.S. Civil Service Commission*, 472 FSupp. 1081 (1979), (discharged Postal employee ordered reinstated because his dismissal was done in

an arbitrary and capricious manner); *Lee* v. *Bolger*, 454 FSupp. 226 (1978); *Oates* v. *United States Postal Service*, 444 FSupp. 100 (1978); and *Lutz* v. *United States Postal Service*, 538 FSupp. 1129, 1134 (1982). Nor was the practice of judicial review of United States Postal Service adverse actions limited solely to the Second Circuit at the time that the Petitioner claim arose.

There were cases so holding from the Fifth Circuit: *Adkins* v. *Hampton*, 586 F.2d 1070 (5th Cir., 1978); *Jordan* v. *Bolger*, 685 F.2d 1384 (5th Cir., 1982), *cert. den.* 459 U.S. 1147; 103 S.Ct. 788 (1983); *Ross* v. *United States Postal Service*, 556 FSupp. 729 (1983); the D.C. Circuit: *Yacavonne* v. *Bolger*, 645 F.2d 1028 (D.C. Cir., 1981), *cert. den.* 454 U.S. 844; 102 S.Ct. 159 (1981); the Sixth Circuit: *Poole* v. *United States Postal Service*, 540 FSupp. 105 (1982); the Eighth Circuit: *Book* v. *United States Postal Service*, 675 F.2d 158 (8th Cir., 1982); *Withers* v. *United States Postal Service*, 417 FSupp. 1 (1976); the Ninth Circuit: *Alsbury* v. *United States Postal Service*, 530 F.2d 852 (9th Cir., 1976), *cert. den.* 429 U.S. 828; 97 S.Ct. 85 (1976); and the Tenth Circuit: *Neal* v. *United States Postal Service*, 468 FSupp. 958 (1979).

The right of judicial review of adverse actions by the Postal Service was so well recognized by the Courts, that its application to claims, arising under the Rehabilitation Act of 1973, as did Petitioners, occasioned no pause from either district of appellate courts, *see, e.g.*, *Prewitt* v. *United States Postal Service*, 662 F.2d 292 (5th Cir., 1981). And to the extent that there was any uncertainty as to whether handicappers claims were subject to judicial review, it was cured by the 1978 amendments to the Rehabilitation Act of 1973, which conferred an express right under Section 501 to sue the Postal Service for any alleged infringements of a handicapped

employee's rights.[9] *Smith* v. *United States Postal Service*, 742 F.2d 257 (6th Cir., 1984); *Connolly* v. *United States Postal Service*, 579 F.Supp. 305 (1984). To provide procedural guidance to claimants and agencies, Congress made the remedies, procedures, rights, and body of law developed under the Civil Rights Act of 1964 applicable to handicappers claims.

> "Thus, by its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in Section 501 and Section 504, that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the Federal governments and its agencies."
>
> *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 304 (5th Cir., 1981).

This amendment became effective in April of 1978, and definitely applied to the Petitioner's claims which were then pending. *Counts* v. *United States Postal Service*, 631 F.2d 46 (5th Cir., 1980)[10]; *Gardner* v. *Morris*, 752 F.2d 1271 (8th Cir., 1985).

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9 **"Legislation amending the Rehabilitation Act became law on November 6, 1978. The 1978 Amendments created a new section of the Act, codified at 29 USC §794 a(a)(1), conferring Title VII rights and remedies on litigants alleging employment discrimination based on a handicapping condition in violation of §791"**

***Counts* v. *United States Postal Service*, at 47-48.**

10 **". . . on June 20, 1980, the Equal Employment Opportunities Commission, charged with responsibility for maintaining equal employment opportunity in the federal civil service, amended its regulations to allow processing of handicapped discrimination complaints by federal job applicants whose complaints arose prior to April 10, 1977, providing the complainant had a pending claim on April 10, 1978."**

45 Fed. Reg. 41634 (June 20, 1980) codified at 29 CRF §1613.709(c).

The lower courts, therefore, had authority under the Rehabilitation Act, as amended, to review the adverse action taken against the Petitioner, notwithstanding that the Postal Service had acted arbitrarily and capriciously in refusing to accept from the Petitioner a claim of handicapper discrimination because it was deemed to be nonpurview. Similarly, in *Alsbury* v. *United States Postal Service*, 530 F.2d 852 (9th Cir., 1976), a case which arose in 1973, when a postal worker was discharged. In ruling that it had jurisdiction to conduct judicial review of the dismissal, the Court in *Alsbury* reiterated that, it had authority to make ". . . a determination that the applicable procedures have been complied with and that the dismissal was supported by substantial evidence and was not arbitrary and capricious", at 854. Also appearing in *Alsbury* at 854 in Note 2 is the Court's conclusion that transformation of the Post Office Department into the United States Postal Service ". . . apparently did not alter the legal standard under which discharge proceedings are to be evaluated."[11]

A. The Procedural Requirements Of The Statutes And Regulations Governing Investigation Of Claims Were Not Complied With By The Postal Service.

The record below suffers from a number of problems, not the least of which is that Petitioner apparently relied heavily on an unofficial advisor for much of the period during which the administrative process occurred. Equally serious is that her initial filing in Federal Court was **in pro per** and apparently consisted of a preprinted form; Further, over the ten-year life of this case, Plaintiff had two or three attorneys before present counsel entered this matter, and it does not appear that

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[11] **39 USC §2005(a)(1).**

her Advisor, or prior counsel spotted or – if they did – raised the handicappers issue on which Petitioner eventually went to trial and on which this appeal is based. In addition, it does not appear that any administrative hearing on Petitioner's handicappers' charges were ever held.

Therefore, we have a record which contains essentially no relevant facts as to her handicappers claim from the administrative phase of this matter. An investigation was evidently conducted into Petitioner's claims, and a report filed, but it focused on issues of race and sex, and that record was mute as to handicapper claims because the Respondent simply refused to process such claims at that time. Therefore, the best available evidence of the scope, nature and focus of the Postal Service's inquiry into Petitioner's possible claim of employment discrimination based upon handicap was the testimony at trial of Ms. Patricia Bean.

Ms. Bean was the EEO Counselor, who took Petitioner's complaint which, in clear terms, stated that she believed her back injuries were a factor in her mistreatment by the Postal Service. Ms. Bean defined the bases of Petitioner Complaint as being limited to allegations of sex and race, and thereafter conducted or directed the investigation for the Postal Service. Her testimony is unequivocal that she never considered the possibility of pursuing for Petitioner a claim based upon physical handicap because such a claim was not within the purview of the Statute under which she operated, i.e., Title VII of the Civil Rights Act of 1964. Even though Petitioner, and all other Postal Service employees, had an absolute right at that time, *see, e.g., Burns* v. *United States Postal Service, supra*, to raise and have processed an adverse action claim sounding in physical handicap, and to have that issue addressed by the Postal Service authorities in a manner that was neither arbitrary,

capricious, nor abusive of discretion, *see*, *Smith* v. *U.S. Postal Service*, 742 F.2d 257 (6th Cir., 1984).

Ms. Bean testified at trial that the Postal Service never even bothered to accept such a claim from Petitioner even though her complaint raised the handicappers issue squarely; nor did the Postal Service deign to investigate Petitioner's claim that her physical handicap was, along with her race, black, and sex, female, the cause of her being discriminated against and ultimately terminated by the Postal Service. Since Petitioner's claim that she was being terminated was due, in part, to her physical handicap, i.e., on-going problems with her back resulting from an on-the-job injury, and although squarely raised in her EEO charges, it was never investigated at all by the Postal Service. It is, therefore, clear that procedural statutes and regulations governing investigation of claims of wrongful or improper termination were not complied with by the United States Postal Service.[12]

B. The Actions Of The United States Postal Service Were Arbitrary, Capricious, And Were Unsupported By Substantial Evidence.

The Postal Service appears to have made a judgment prior to the time that the Petitioner's claim arose: (a) that the rights of its employees protesting an

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[12] **Since, as Ms. Bean testified, the Postal Service never even considered Appellant's claim based upon handicapper allegations, and never conducted any sort of inquiry or investigation into her claims, Petitioners' procedural rights under 5 USC §7501 to have her claim investigated, and to have the benefit of a hearing on same were clearly violated. The omission is clear proof that the Postal Service did not comply with applicable federal statutes and regulations as to investigation of her claim. And without an investigation and finding of fact, it is difficult to escape the conclusion that the Postal Service acted arbitrarily. *Shaposka* v. *United States*, 215 Ct.Cl. 34; 563 F.2d 1013 (1977).**

adverse action would be looked at through a very narrow framework and (b) that unless an adverse action claim fit or could be made by the EEO Counsellor to fit one of the pigeonholes that were convenient for it administratively, the claim would simply be unacceptable as a nonpurview item. Effectively, that attitude shut the door to any possible vindication of any handicapper's rights by Petitioner because, in the eyes of the Postal Service, her complaints based on physical handicap were beyond the pale; They were nonpurview, and therefore unworthy of any administrative processing.

In examining a Postal Service employee at trial, the following colloquy ensued:

> "Q. (By Mr. Thomas, continuing): So back to the postal service for training for your duties as an EEO counselor, did you not receive any training in the process for handicapper's related claims?
>
> A. No, only those purview items that were acceptable items.
>
> Q. Age, race, sex, color, religion, national origin?
>
> A. Yes.
>
> Q. And that you were trained?
>
> A. Yes, you had to know the basis for a person filing a complaint."

From the foregoing, it is clear that when Petitioner presented to the Postal Service claiming that she had been the subject of an adverse action due to a physical handicap, and demanded relief, her claim was simply ignored because it was deemed a nonpurview item. Put another way, the Postal Service took the unreasonable, and unlawful, position that it had no jurisdiction to even attempt a resolution of an adverse action claim

based on physical handicap. But it is clear that it did have the jurisdiction, *See*, *Burns* v. *United States Postal Service*, *supra*, at 626; *Withers* v. *United States Postal Service*, 417 FSupp 1, 3 (1976), where the Court stated:

> "Based upon the strong presumption in favor of judicial review of administrative actions, see *Barlow* v. *Collins*, 397 U.S. 159; 90 S.Ct. 832; 25 L.Ed.2d 192, and *Abbott Laboratories* v. *Gardener*, 387 U.S. 136; 87 S.Ct. 1507, the absence of an expression of Congressional intent to the contrary, see Legislative History of the Postal Reorganization Act, 1970 U.S. Cong. & Adm. News, pp. 3649-3723; the existence of a general jurisdictional statute providing for jurisdiction in the federal courts of suits by or against the Postal Service, 39 U.S.C. § 409(a) (1970); provision in the Act for the application of Chapter 75 of Title 5 which pertains to the rights of a federal employee during adverse employment proceedings; and provision for judicial review in the rules which the parties deem applicable to this proceeding, the Court believes that jurisdiction is proper under 39 USC § 409(a) (1970) for our 'nonstatutory' judicial review of plaintiff's discharge."

The EEO Counselor further testified that she considered only matters of race, color, religion, national origin and sex. (T.P. 110-113) She did not consider Petitioner's complaints as to her physical handicap at all. To her, based on her training by the Postal Service, they were — in effect — simply to be ignored as nonpurview items. (T. 112-113)

> "Q. (By Mr. Thomas continuing his examination of the witness): Were you advised or was it part of your duty to discuss the basis for a charge with the charging party in order they

would understand more fully what they were attempting to do?

A. Again, I say you would explain timeliness and purview to them to make sure they understood the basis on which the complaint would be accepted.

Q. So you did have a need to explain purview?

A. Purview as well as time limits.

Q. Matters within your purview were developed and explained to the charging party?

A. Yes, and those things that were not in the purview also explained.

Q. Handicappers was not?

A. It was not a purview item at that time.

Q. But non-purview items were explained?

A. Any non-purview item that was brought up by the complainant it was explained to them what purview was, what was the basis for filing, and if it was not a purview item, the complaint could be rejected as non-purview.

Q. The body of the document does contain language that the crux of her problem is physical in nature; isn't that correct?

A. She spoke of an injury."

Petitioner was undeniably the subject of adverse action by the Postal Service because she was fired. She was terminated due to her physical handicap flowing from an on the job injury, but was unable to raise that specific allegation with the Postal Service because of it's policy and practice at the time arbitrarily to label complaints based upon a physical handicap as nonpurview,

and then to ignore them, or recast them to sound as something other than a handicappers claim. The process, as followed by the Postal Service, had the effect of shutting off any possibility of judicial review of Postal Service actions as they impinged upon or adversely affected Petitioner because she could never even raise the issue administratively, which was the necessary condition precedent to later judicial review, e.g., *Ryan* v. *Federal Deposit Insurance Corp.*, 184 U.S. App. D.C. at 188-1895; 565 F.2d at 763-64 (D.C. Cir., 1977); *accord: Neal* v. *United States Postal Service*, 486 F.Supp 958, 961 (1979), where the Court said:

> "Although the judicial review provisions of the Administrative Procedure Act, specifically 5 USC § 702, are expressly inapplicable to the Postal Service by virtue of 39 USC § 410(a), the courts have recognized a nonstatutory right to judicial review of Postal Service actions "adverse" to its employees. E.g., *Oates* v. *United States Postal Service*, 417 F.Supp. 1, 3 (1976). For the reasons stated in those opinions, this court concurs in the view that Postal Service employees are entitled to judicial review of adverse action against them by the Service. The court is unable to perceive any plausible reason for refusing to extend this rule to permit judicial review of alleged discriminatory action adverse to a handicapped employee."

The practical effect of Respondent's policy of simply ignoring handicapper's claim as nonpurview was to bar Petitioner, for no good reason, from pursuing her claim based upon her physical condition. *Jackson* v. *United States Postal Service*, 666 F.2d 258 (5th Cir., 1982). Such a policy has to be viewed as arbitrary and capricious, or abusive of discretion. It served no lawful purpose for the Postal Service while, in effect, working an enormous

hardship on Petitioner, who lost the right to pursue her claim based on physical handicap. The actions of the Respondent as to Petitioner were therefore arbitrary and capricious, or abusive of its discretion.

CONCLUSION

For the foregoing reasons, Petitioner submits that at the time that her claim arose in 1977, she enjoyed a non-statutory right of judicial review as to her dismissal because of her physical handicap. The relevant statutes conferring rights upon the handicapped applied to her, or for her benefit there existed the common law right of judicial review as to adverse personnel actions to determine whether they were arbitrary, capricious or an abuse of discretion.

Therefore, the trial court had subject matter jurisdiction of Petitioner's claim and the dismissal was reversible error. The Court of Appeals was clearly erroneous in its affirmance of the Trial Court, and should therefore be reversed.

Respectfully submitted,

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Dated: October 29, 1991

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION

(United States Court of Appeals — Sixth Circuit)

(Filed June 24, 1991)

(MILDRED BANKS, Plaintiff-Appellant, v. UNITED STATES POSTAL SERVICE, et al., Defendants-Appellees — No. 88-1050; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: JONES and RYAN, Circuit Judges,
and PECK, Senior Circuit Judge.

PER CURIAM.

In this civil rights action, plaintiff-appellant Mildred Banks appeals the district court's judgment granting the United States Postal Service's motion to dismiss. For the following reasons, we affirm the judgment of the district court.

I.

In 1967, Mildred Banks, a black female, received a competitive appointment to the U.S. Postal Service in Detroit, Michigan, as a substitute distribution clerk. Excepting maternity leave in October of 1968, Banks worked without interruption or incident for approximately nine and one half years. In the fall of 1976, Banks was the successful bidder for the position of OCR Operator PS-5, Tour III.

On January 17, 1977, while on duty in her new position, Banks injured her left arm and shoulder in a work

related accident. Banks reported the injury to her supervisor and was examined and treated at an Industrial Clinic the same day. On February 18, 1977, Banks injured her right hand and shoulder. Banks reported the injury to her supervisor and was again examined and treated at an Industrial Clinic the same day. On May 19, 1977, while lifting trays of mail at work, Banks injured her back in the lumbar region. She was transported to the emergency room at Sinai Hospital of Detroit, where she was examined, diagnosed as suffering from a lumbar sprain, treated and released. Banks took medical leave for the May 19 injury and remained off work from May 19 to June 2, 1977.

From June 2 through June 14, 1977, Banks worked on light duty status. On June 14, 1977, she returned to work on fully-duty status, but was unable to perform her duties. Thus, Banks was absent again due to her injury from June 15 to June 20, 1977. She returned to light duty status on June 21 and worked until August 22, 1977, at which time her back caused her to take leave again. This led to absences from August 23 through August 31, 1977, whereupon Banks returned to light duty status on September 1, remaining through September 26, 1977. Another period of leave occurred from September 27 until October 20, 1977.

Banks twice applied for permanent light duty status in September and October of 1977, but the request was denied both times. On October 21, 1977, Banks returned on full duty status and worked until November 1, 1977, but then shifted to light duty status on November 2, 1977. After another period of leave, from November 16 to December 1, 1977, she returned to work on December 1, 1977 but reinjured her back and was forced to stop working yet again.

On December 8, 1977, Banks again filed for permanent light duty status. On December 29, 1977, the Postal Service sent and she received a Notice of Removal effective February 8, 1978, the reason assigned being her failure to meet the requirements for her position. The Notice alleged that from August 13, 1977, through December 29, 1977, Banks failed to report for duty on no fewer than forty-two occasions. The Notice stated that "Your undependability in reporting and not being available for duty when needed and as scheduled indicates that you are unable to meet the requirements of your position."

Banks filed a grievance pursuant to a collective bargaining agreement between her union and the Postal Service. She also contacted an equal employment opportunity (EEO) counselor, Patricia Bean, on December 14, 1977, and complained that postal managers denied her authorization for prompt medical treatment and permanent light duty status. Banks contended that these actions were discriminatorily based on her race and sex, in violation of Title VII, 42 USC § 2000e *et seq.* On January 5, 1978, she initiated further EEO counseling with Ms. Bean, and alleged that the December 29, 1977, Notice of Removal was discriminatorily based on race and sex. On January 16, 1978, and on March 23, 1978, she filed a formal administrative complaint encompassing the above allegations.

Meanwhile, on July 28, 1978, Banks and the Postal Service reached a settlement. The settlement provided that Banks' time off during the grievance would be considered as a long term suspension without pay. She was to be reinstated at the beginning of the first pay period following the signing of the settlement. The settlement also provided that:

> This settlement is being made with the clear understanding that there will be no back pay

> involved and that the grievant must meet the attendance requirements of the Postal Service and work at her regular job in a full duty status and her failure to abide by the above will lead to her discharge from the Postal Service.

By letter, the Postal Service directed Banks to report to work on September 18, 1978. The letter further stated that if she was unable to report to work she was to submit administratively acceptable medical documentation to Mr. Albert Vreeland, Supervisor of Tour III. Banks was unable to return to work at this time and submitted a note from her treating physician, which indicated that in his medical judgment she was unable to resume her duties. Banks was absent from work from September 18, 1978 to October 19, 1978. Mr. Vreeland rejected the note as administratively unacceptable. He placed Banks on absent without official leave status. On October 19, 1978, Banks received a second Notice of Removal letter, effective November 30, 1978. The removal letter informed Banks that she had the right to file a grievance within fourteen days of receipt of the notice. Banks failed to file a grievance, an EEO complaint, or any other administrative complaint regarding her second discharge. Moreover, she failed to file any complaint of handicap discrimination regarding the first or second discharges.

The formal EEO administrative complaints filed on January 16 and March 23, 1978, were combined for a hearing on November 28, 1978. The EEOC recommended findings of no discrimination in each case, which were adopted by the Postal Service in its final agency decision on April 29, 1980.

Banks filed a complaint in federal district court on May 29, 1980, alleging that she had been discharged from the Postal Service on the basis of her race and sex, in violation of Title VII. On September 29, 1983,

Banks amended her complaint and alleged employment discrimination based on sex, race and handicap. A second amended complaint alleging sex, race and handicap discrimination was filed on August 28, 1984. Finally, a third amended complaint alleging, among other things, violations of Title VII and the Rehabilitation Act was filed on April 30, 1987.

The Postal Service moved for summary judgment on September 27, 1987. The Postal Service contended that all of Banks' claims should be dismissed except the count relating to sex and race discrimination. On November 19, 1987, the district court granted most of the Postal Service's motion. The court dismissed counts alleging violations of procedural and substantive due process, bad faith, breach of contract and tortious interference with workers compensation claim. Remaining for trial were the counts alleging sex and race discrimination, handicap discrimination and violation of Postal Service regulations.

A bench trial was held on December 14 and 15, 1987. At trial, Banks conceded that there was no evidence of sex or race discrimination and therefore withdrew those claims. After the presentation of plaintiff's evidence, the Postal Service moved for a dismissal pursuant to Fed. R. Civ. P. 41(a), and the district court granted the motion.

The district court's dismissal rested on several grounds: (1) "there [was] not a whisper of race or sexual discrimination"; (2) Banks claimed race and sex discrimination and not handicap discrimination; (3) assuming Banks claimed handicap discrimination, the "handicapper act" did not become effective until well after the incidents giving rise to Banks' claim of handicap discrimination; (4) assuming Banks claimed handicap discrimination, Banks failed to exhaust her administrative remedies with respect to a handicap dis-

crimination claim; (5) assuming a nonstatutory right of judicial review of her adverse discharge, the Postal Service substantially complied with applicable procedures; (6) assuming a nonstatutory right of judicial review of her adverse discharge, the discharge was not arbitrary or capricious, but supported by substantial evidence. This timely appeal followed.

The sole issue on appeal is whether the district court erred in dismissing appellant's claim of handicap discrimination by failing to recognize that appellant had a nonstatutory right of review of the postal service's adverse personnel actions. "The standard for appellate review from a district court's dismissal under Rule 41(b) is to determine if the trial court's factual conclusions were clearly erroneous." *Risinger* v. *Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 479 (6th Cir., 1989).

II

We first note that from our review of the record, it appears that a claim based upon handicap discrimination was not raised by Banks until September 29, 1983, in her first amended complaint. In her Equal Employment Opportunity Investigative Affidavit, filed on September 29, 1978, Banks stated that:

> I feel that I was perpetually discriminated against because of my race and sex (black [f]emale) . . .

Further, Banks stated that

> [M]ale employees were not treated in the same manner as I was in resolving their continued pay and permanent light duty . . .

The EEO Investigative Report stated:

> (1) The Complainant alleges that she was discriminated against because of her Race (black)

> and Sex (female) in that she was denied authorization for Proper Treatment by Management on December 1, 1977. (2) That she was refused by Management to be placed in a Permanent Light Duty Status with continuation of pay from December 1, 1977, due to her Race (black) and Sex (female).

Finally, the original complaint filed in the district court in 1980 alleged only race and sex discrimination.

On appeal, Banks frames the issue as whether

> There existed at the time that appellant's claims arose in 1976 a nonstatutory right to judicial review of U.S. Postal Service personnel actions that were adverse to her if they were arbitrary, capricious or an abuse of discretion.

The Postal Service contends that there is no nonstatutory right to judicial review of adverse personnel actions against Postal Service nonpreference eligible employees.

Some courts have recognized a nonstatutory right to judicial review of Postal Service actions adverse to its employees. *See, e.g., Neal* v. *United States Postal Service*, 468 FSupp. 958, 961 (N.D. Utah 1979). Courts recognizing such review, however, note that it "is narrowly limited to an inquiry as to whether the Postal Service substantially complied with applicable procedures, whether its actions were arbitrary or capricious, and whether its decision was supported by substantial evidence." *Id.* at 961.

More recently, however, other courts have held that "nonpreference eligible Postal Service employees have neither a statutory nor nonstatutory right to judicial review of adverse personnel actions." *Yokum* v. *United States Postal Service*, 87 F.2d 276, 278 (4th Cir., 1989); *see*

also Royals v. *Tisch*, 864 F.2d 1565, 1567-68 (11th Cir., 1989); *Diaz* v. *United States Postal Service*, 853 F.2d 5, 7-9 (1st Cir., 1988); *Witzkoski* v. *United States Postal Service*, 848 F.2d 70, 71-73 (5th Cir., 1988); *see, cf. United States* v. *Fausto*, 484 U.S. 439 (1988) (holding that nonpreference eligible employee of the Fish and Wildlife Service was not entitled to judicial review of the merits of his disciplinary proceedings).

Relying on the Supreme Court's decision in *Fausto*, this court held in *Parker* v. *United States Postal Service*, 859 F.2d 922 (6th Cir., 1988) (per curiam), *cert. denied*, 490 U.S. 1048 (1989), that a nonpreference eligible employee does not have a nonstatutory right to judicial review of an adverse Postal Service personnel decision.

It is uncontested that Banks was a nonpreference employee. Accordingly, Banks does not have a nonstatutory right to judicial review and the district court was without jurisdiction to review her discharge. *See Foster* v. *Kassulke*, 898 F.2d 1144, 1146 (6th Cir., 1990) (appellate court can affirm the district court for reasons other than those stated by the district court).

III.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

DISTRICT COURT'S RULING ON RULE 41(a) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

(United States District Court –
Eastern District of Michigan –
Southern Division)

(Issued December 14, 1987)

(MILDRED BANKS, Plaintiff, v. UNITED STATES POSTAL SERVICE, et al., Defendants — No. 80-72016)

* * *

THE COURT: Well, in truth, this most assuredly is a very unusual case from the standpoint of the circumstances which evolved beginning in May of 1977 and when Miss Banks had her first incident on the job.

We know clearly, of course, that all of the, at any time, either initially or the early stages, the fact that she was let go because of race and sex discrimination, the Court has stated earlier, the occurrence of both of those, there is not a whisper of race or sexual discrimination in this case. Actually there is no evidence at all that people who finally had terminated this lady knew whether she was black or white or yellow or whatever. So, clearly, there is no race or sex discrimination.

It has been urged upon the Court that at the time that Miss Banks was sent to the EEO counselor, Patricia Beam, I guess the thrust of what the Plaintiff's theory, that she was, in effect, stating that she was a handicapped person at that time. The theory behind that, I would guess would be that she stated that not once, but several times that she had been injured on the job as early as May of 1977 and then again in December of

1977 and that by virtue thereof, she was unable to perform her duties. Then during that stated period of time, she had some 42 absences from work because of her inability to do her job and that it must be the theory of the Plaintiff that that transformed it and elevated it to a specific claim of discrimination under the handicapper act. The Court does not buy that because now the Government has been held to the responsibility of transforming what happened into any claim that she was being discriminated against under the handicapper act. Indeed, the truth of the matter is that the handicapper act went, was enacted in 1973, it was not to be applicable to the Post Office until November of 1978. Okay. These events were well prior to that period of time. Indeed, I think it was Miss Bean that proposed that to Counsel but those matters were not with the purview, I think the expression that was used, of this in depth discussion or giving of advise thereon.

There is absolutely no evidence here that Miss Bean acted in an unconscientious manner. Indeed, there has been no evidence or argument that she was either neglectful or that she was, she was conscientiously trying to abort any of the rights of this lady, the Plaintiff in this case, and as a consequence under the Exhaustion Rule it is true that this Plaintiff never exhausted her administrative remedies in this regard and would be out of court and the end of that claim on that alone. But, if the *Neal* case could be distorted into claiming, I think, that it would give the Court authority to just summarily initiate a de novo review and make its own determination to substitute its own determination for that the administrative proceedings, that the *Neal*, of course, stated that if there would be such review, and I quote: "Such review, however, is narrowly limited to an inquiry as to whether the Postal Service substantially complied with applicable procedures; whether its

actions were arbitrary and capricious and whether the decision was supported by substantial evidence.

There is nothing here to indicate that they did not conform to applicable procedures at the time and at the place. There is nothing to indicate that the actions were arbitrary or capricious and there was nothing to indicate but what its decision in the final analysis was not supported by the substantial evidence, to-wit; it is my understanding from the evidence that this unfortunate lady went to as many as five doctors, two of her own and three to whom she was sent by the Government and that two or three of those, at least, were specialist of some sort and no one ever came up with the herniated disc diagnosis. Indeed, I guess, the most anyone ever said was it was a lumbar strain. Well, there is nothing to indicate that, you know, that everybody was in cahoots here, her doctors and the Government doctors or in cahoots with another or altogether to try to minimize this lady's physical problems. If we are to believe Dr. Gilroy and there's no reason why we can't, this lady has had a herniated disc since May of 1977 in his opinion and furthermore in his opinion he feels that the physicians who have been involved could have and should have known that themselves in 1977 and 1978; that enough of the classical symptoms were there from which they could have made a conclusion but the truth of the matter is they did not make that conclusion.

Now, it may be that now or at some point in time Mrs. Banks may have herself a fine lawsuit for malpractice for Dr. Two, Three, Four or Five who didn't diagnose her case properly. If we are to believe Dr. Gilroy, she has, but that doesn't transform it into the fact that for and on behalf of the Government here involved acted arbitrarily or capriciously in the exercise of their considered judgment. Why? Because the lady, the Plaintiff, reported her incident. She duly went to her own physi-

cian. She was referred to any physician and if everybody did everything by the numbers as they were supposed to have done in the examination that took place, her own doctor, the most serious thing which they could diagnose was a lumbar strain and if we believe Dr. Gilroy, it was the coward's way out and is not an expression that a responsible neurologist or physician even uses in a case like this where they have these classical symptoms which he stated evidenced themselves early as 1977. So, those are the diagnoses. The Government's physician as stated that she should go back on her regular or full duty. Then we turn to the Plaintiff's supervisors who have to make the decision. What are they to do? Well, they do not have to take the private physician's position of the employee and they chose not to do that and they shored up their resolve by having more than one Government medical opinion on the subject matter. It was not an arbitrary or capricious decision which they made given no regard at all. So, they ultimately made the pronouncement that this lady should be terminated.

Prior to that, of course, we had the arbitration settlement. That was effected by the Plaintiff's representatives, Mr. Williams, of the Union and the officer of the Post Office Department. In the determination made an agreement upon, she would return to work on or about September 18, 1978. She did not do that. She stated when she was here on the stand that she couldn't do the work and Dr. Gilroy said, no, indeed, she could not return to work.

So, we have then a situation that if we even get that far in this case. If we look at 41 FSupp 619, was there enough raised here by this Plaintiff to raise an issue of fact that whether or not the EEO counsel, Miss Bean, at the time and place her actions when informing her how to pursue her claim, did any of her actions or anything

else raise to the level of affirmative misconduct and the answer is no. There is absolutely nothing here to show that anybody acted in anything other than good faith.

I think I heard Mr. Thomas to say, use the words "callousness disregard". I am not satisfied that we even get to that point. These are the people who are trying to do their job in the best fashion that they could. They knew that the Plaintiff here had several bites of the apple, lots of opportunity to state her case and her position and the Government had several opportunities to return in kind and make a judgment and there is not one scintilla of evidence from anybody that the Government acted in anything but good faith. To say that there is race or sex discrimination here is just utter nonsense and to say that somebody dropped the ball as far as the handicapper act is concerned, imposes upon them obligations and responsibilities that are far beyond details and require a quantum leap to the time and place and circumstances both of an act that was not within the Post Office's purview at that particular time as well as unanimous medical opinions across the board that she did not have a herniated disc and at least three out of five doctors who said that she could return to work and they acted upon it. I don't know who we can hold them responsible to say that she had been discriminated against under the handicapper act, assuming we get to that point.

I think you cannot get to that point but I think you are entitled to have me touch upon it.

There is an expression I really — I don't know really whether an analogy or not, but sometimes things fall through the cracks. Some cases in this court and in other courts in this building and all of a sudden you wake up and say, "What happened to that?" All kinds of things have gone wrong. This is a case that she had a

herniated disc as early as May of 1977 but it fell through the cracks, apparently not anyone's fault which, in good faith, she went to two doctors of her own and she went to three doctors. When somebody told her to march herself off and submit herself to an examination by somebody else and a conscientious effort, "Solve my problem, make me better so I can work." but everybody missed it, apparently.

Now, that does not transform itself, however, into a race or sex discrimination case. It does not transform itself into a discriminatory act by these Defendants or an act that was not within the EEO purview at the time of the early event when the claim was being made. There is nothing here that pretends to speak of arbitrariness or capriciousness or careless disregard or affirmative misconduct which might be the trap door through which someone like Miss Banks can escape, the circumstances being different.

Whether or not there yet exists a possible malpractice suit, I don't know. That is not for me to determine, and suffice it to say if Dr. Gilroy can be believed and he certainly has credentials and definitely knows his business, these five people which missed the diagnosis here that he things [*sic*] was simple enough to make as early as 1977, '78.

So, well, the Post Office, the Defendant in this case is not liable under the circumstances that may be found and the Court grants the Motion.

Prepare an order and submit it to Mrs. Hanson on or before 1:00 tomorrow.

(Proceedings concluded.)

APPENDIX C

TEXT OF STATUTES

ADMINISTRATIVE PROCEDURE ACT
5 USCS § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: **Provided**, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 392; Octo. 21, 1976, P.L. 94-574, § 1, 90 Stat. 2721.)

CIVIL RIGHTS ACT OF 1964
42 USC § 2000e-16
Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code [5 USCS § 102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS § 105] United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall:

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department

and agency and each appropriate nit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to:

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 20003-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities

under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(July 2, 1967, P.L. 88-352, title VII, § 717, as added Mar. 24, 1972, P.L. 92-261, § 11, 86 Stat. 111.)

CIVIL RIGHTS ACT OF 1964
42 USC § 2000e 5 (F)-(K)

(F) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The

person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (a) by the person claiming to be aggrieved or (b) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a govern-

ment, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such prac-

tice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not fund within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of section 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations

on judicial orders. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e(a)].

(h) Provisions of 29 USCS §§ 101 et seq. not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of court sitting in equity, and for other purposes," approved March 23, 1932 (29 USC 101-115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders. In any case in which an

employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) Attorney's fee, liability of Commission and United States for costs. In any action or proceedings under this title [42 USC §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(July 2, 1964, P.L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P.L. 92-261, § 4, 86 Stat. 104.)

CIVIL SERVICE REFORM ACT OF 1978

5 USCS § 7502
Actions Covered

This subchapter [5 USCS §§ 7501 et seq.] applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title [5 USCS § 7521 or § 7532] or any action initiated under section 1206 of this title [5 USCS § 1206].

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204(a), 92 Stat. 1135.)

5 USCS § 7504
Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter [5 USCS §§ 7501 et seq.].

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204(a), 92 Stat. 1135.)

5 USCS § 7511
Definitions; application

(a) For the purpose of this subchapter [5 USCS § 7511 et seq.]:

(1) "employee" means:

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title [5 USCS § 7501(2)];

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter [5 USCS §§ 7511 et seq.] does not apply to an employee:

(1) whose appointment is made by and with the advise and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by:

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter [5 USCS §§ 7511 et seq.] to any position or group of positions excepted from the competitive service by regulation of the Office.

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204(a), 92 Stat. 1135.)

5 USCS § 7512
Actions covered

This subchapter [5 USCS § 7511 et seq.] applies to:

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to:

(A) a suspension or removal under section 7532 of this title [5 USCS § 7532],

(B) a reduction-in-force action under section 3502 of this title [5 USCS § 3502],

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321 (a)(2) of this title before becoming such a supervisor or manager.

(D) a reduction in grade or removal under section 4303 of this title [5 USCS § 4303], or

(E) an action initiated under section 1206 or 7521 of this title [5 USCS § 1206 or § 7521].

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204 (a), 92 Stat. 1136.)

5 USCS § 7513
Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter [5 USCS § 7511 et seq.] against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to:

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701].

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter [5 USCS §§ 7511 et seq.], together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204(a), 92 Stat. 1136.)

5 USCS § 7514
Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter [5 USCS §§ 7511 et seq.], except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

(Added Oct. 13, 1978, P.L. 95-454, Title II, § 204(a), 92 Stat. 1137.)

5 USCS § 7532
Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who:

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States;

is entitled, after suspension and before removal to:

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 529.)

POSTAL REORGANIZATION ACT OF 1970

39 USCS § 409
Suits by and against the Postal Service

(a) Except as provided in section 3628 of this title [39 USCS § 3628], the United States district courts shall have original but not exclusive jurisdiction

over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provision of chapter 89 of title 28 [28 USCS §§ 1441 et seq.].

Effective date of section: This section became effective July 1, 1971, pursuant to Resolution No. 71-9 of the Board of Governors; see section 15(a) of Act Aug. 12, 1979, set out as a note preceding Part I of this Title.

Code of Federal Regulations

39 CFR Parts 222, 224, 912.

Cross References

Jurisdiction over postal matters, 28 USCS § 1339.

Venue in action against federal officer, 28 USCS § 1391(e).

Venue in tort action against United States, 28 USCS § 1402.

Statute of limitations for bringing action against United States, 28 USCS § 2401.

Time for commencing actions brought by United States, 28 USCS § 2415.

39 USCS § 410
Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [5 USCS §§ 501 et seq., 701], shall apply to the exercise of the powers of the Postal Service.

REHABILITATION ACT OF 1973

29 USCS § 791(b)

(b) **Federal agencies; affirmative action program plans.** Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, with one hundred and eighty days after the date of enactment of this Act [enacted Sept. 26, 1973], submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Commission, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

29 USCS § 794
Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) **Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.** No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined.** For the purposes of this section, the term "program or activity" means all of the operations of:

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(2) (A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 [20 USCS § 2891(12)], system of vocational education or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship:

(i) if assistance is extended to such corporation, partnership, private organization or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) **Small providers; exceptions to existing facilities.** Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(Sept. 26, 1973, P.L. 93-112, Title V, § 504, 87 Stat 394; Nov. 6, 1978, P.L. 95-602, title I, §§ 119, 122 (d)(2), 92 Stat. 2982, 2987; Octo. 21, 1986, P.L. 99-506, title I, § 103(d)(2)(B) in part, Title X, § 1002 (e)(4), 100 Stat. 1810, 1844; Mar. 22, 1988, P.L. 100-259, § 4, 102 Stat. 29; Nov. 7, 1988, P.L. 100-630, Title II, § 206(d), 102 Stat. 3312.)

APPENDIX D

TEXT OF REGULATION

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29 CFR § 1613.709(c)

(c) Notwithstanding the provision of subsection (b), a complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance, and were pending with the agency, the Civil Service Commission or in a Federal Court on April 10, 1978. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days from the publication of this subsection in final form in the FEDERAL REGISTER.

[43 FR 12295, Mar. 24, 1978, redesignated at 43 FR 60901, Dec. 29, 1978, and amended at 45 FR 41634, June 20, 1980]

Supreme Court, U.S.
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(2)

No. 92-220

In the Supreme Court of the United States

OCTOBER TERM, 1992

MILDRED BANKS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim of handicap discrimination was subject to judicial review.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 936 F.2d 572 (Table).

JURISDICTION

The court of appeals entered its judgment on June 24, 1991. On September 26, 1991, Justice Stevens granted an extension of time within which to file a petition for a writ of certiorari to and including November 6, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the United States Postal Service in 1967 as a substitute distribution clerk. Petitioner remained in that position until 1976, when she was the successful bidder for a position as an optical character reader operator. On January 17, 1977, petitioner injured her left arm and shoulder while on duty. She was examined and treated at a clinic that day. On February 18, 1977, petitioner injured her right hand and shoulder; again, she was examined and treated the same day. On May 19, 1977, petitioner injured her back while lifting mail trays. She was transported to the hospital, where she was diagnosed as suffering from a lumbar sprain and released. Pet. App. A1-A2.

Petitioner did not return to work until June 2, 1977. Thereafter, petitioner was absent from work from June 15 to June 20, 1977; from August 23 to August 31, 1977; from September 27 until October 20, 1977; and from November 16 to December 1, 1977. She returned to work on December 1, 1977, but reinjured her back and stopped reporting for work. In all, petitioner failed to report for duty on approximately forty-two occasions in a four and one-half month period. On December 29, 1977, the Postal Service sent petitioner a Notice of Removal stating that she was being removed from her position because of her poor attendance record. Pet. App. A2-A3.

Petitioner, who is a black woman, contacted an equal employment opportunity (EEO) counselor. On January 16, 1978, petitioner filed a formal EEO complaint charging that the Postal Service had discriminated against her on the basis of race and gender by failing to provide prompt medical treatment for her alleged work-related back injury and by denying her request for permanent light duty status. In March

1978, petitioner filed a second EEO complaint charging that the Postal Service's December, 1977, notice of removal was based on race and gender discrimination. Pet. App. A3. Following a hearing, the EEOC found no discrimination. The Postal Service adopted the EEOC's findings in a final agency decision. *Id.* at A4.

Petitioner also filed a grievance challenging her removal pursuant to the collective bargaining agreement. The grievance was settled on July 28, 1978. Under the terms of the settlement, petitioner was reinstated and her discharge was converted to a disciplinary suspension without pay from the effective date of her removal to the date of her reinstatement. Pet. App. A3-A4. The settlement provided that petitioner "must meet the attendance requirements of the Postal Service and work at her regular job in a full duty status," and further provided that petitioner's "failure to abide from the above will lead to her discharge by the Postal Service." *Id.* at A3-A4.

Following her reinstatement, petitioner failed to report to work from September 18, 1978 to October 19, 1978, and failed to provide adequate medical documentation to excuse her absence. On October 19, 1978, the Postal Service issued a second Notice of Removal, effective November 30, 1978. Petitioner did not file a grievance or an EEO complaint challenging her removal. Pet. App. A4.

2. Petitioner brought this action in district court alleging that she had been discharged from the Postal Service because of her race and gender, in violation of Title VII, of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. On September 29, 1983, petitioner amended her complaint to allege that the government had unlawfully discriminated against her on the basis of a handicap—*i.e.*, her back injury. Petitioner's final

amended complaint alleged, *inter alia*, violations of Title VII and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. 701 *et seq.*). Pet. App. A4-A5.

Following a trial at which petitioner conceded that there was no evidence of race or gender discrimination, the district court granted the Postal Service's motion to dismiss. The district court found that "there [was] not a whisper of race or sexual discrimination in this case." Pet. App. B1. The court held that the Rehabilitation Act was inapplicable because petitioner's claim arose prior to Congress's creation of a private cause of action under that Act. *Id.* at B2. In addition, the court found that petitioner had not exhausted her administrative remedies. *Ibid.*

The district court further held that, even assuming petitioner's claim was subject to judicial review, she was entitled to no relief. The court found that there was nothing "to indicate that [petitioner's discharge] did not conform to applicable procedures," and "nothing to indicate that the actions [of the Postal Service] were arbitrary or capricious [or that] its decision in the final analysis was not supported by the substantial evidence." Pet. App. B3. Although petitioner contended at trial that she suffered from a herniated disc, the district court found that prior to her discharge she "went to as many as five doctors * * * [and] the most anyone ever said was it was a lumbar strain." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A8. The court noted that petitioner had not raised a claim of discrimination on the basis of handicap until September 29, 1983. Pet. App. A6. Relying on this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), the court held that petitioner, as a nonpreference eligible Postal Service employee, had

no nonstatutory right to judicial review of an adverse personnel decision of the Postal Service under the Civil Service Reform Act of 1978. Pet. App. A7-A8. The court thus concluded that the district court was without jurisdiction to review her discharge.

ARGUMENT

1. Petitioner alleged that the Postal Service discriminated against her on the basis of a handicap, in violation of Section 501 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 390 (codified at 29 U.S.C. 791). In 1978, Congress amended the Rehabilitation Act of 1973 to create a private right of action for claims of discrimination under Section 501. Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Tit. I, § 120(a), 92 Stat. 2982 (codified at 29 U.S.C. 794a(a)(1)). See *Counts* v. *United States Postal Serv.*, 631 F.2d 46, 47 (5th Cir. 1980). The 1978 amendments took effect on November 6, 1978; petitioner was removed from her position on November 30, 1978. Consequently, petitioner had a private right of action under the Rehabilitation Act.

The amendments to the Rehabilitation Act "conferr[ed] Title VII rights and remedies on litigants alleging employment discrimination based on a handicapping condition." *Counts*, 631 F.2d at 47-48 (footnote omitted). Petitioner, like other federal employees seeking a Title VII remedy, was therefore required to exhaust her administrative remedies before seeking relief from the federal courts. *Boyd* v. *United States Postal Serv.*, 752 F.2d 410, 412 (9th Cir. 1985); *McGuinness* v. *United States Postal Serv.*, 744 F.2d 1318, 1320 (7th Cir. 1984); *Smith* v. *United State Postal Serv.*, 742 F.2d 257, 262 (6th Cir. 1984); *Prewitt* v. *United States Postal Serv.*, 662 F.2d 292, 303 (5th

Cir. 1981); 29 C.F.R. 1613.709(c). Petitioner never brought her claim of handicap discrimination to the attention of the EEOC. Instead, petitioner raised an allegation of handicap discrimination for the first time in 1983, in her amended complaint in the district court. Because petitioner failed to exhaust her administrative remedies, her claim of handicap discrimination was not subject to judicial review under the Rehabilitation Act.[1]

Petitioner contends (Pet. 23-25) that her two EEO complaints should be deemed to satisfy the administrative exhaustion requirement. But those complaints alleged only that the Postal Service's first Notice of Removal was based on race and gender discrimination. Although petitioner's EEO complaints were pending when Congress enacted the 1978 amendments to the Rehabilitation Act, neither complaint alleged discrimination based on handicap. If petitioner wished to raise an allegation of handicap discrimination, she was required to notify the EEOC that she intended to include such an allegation in her pending complaints. See 29 C.F.R. 1613.709(c) ("[A] complainant may request an agency to process allegations of handicap discrimination which had been filed as a discrimination complaint or as a grievance * * *. Such requests for processing of allegations of handicap discrimination must be brought to the attention of the agency EEO counselor not later than 180 days

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[1] We agree with petitioner that judicial review of her claim of handicap discrimination was not precluded by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.). Petitioner's claim arose on November 30, 1978. See Pet. App. A4. The CSRA did not become effective until January 11, 1979, and Congress did not intend the CSRA to have retroactive effect. See 5 U.S.C. 1101 note; 5 C.F.R. 1201.191(b) (1979).

from the publication of this subsection."). Because petitioner did not notify the EEO officer that she was alleging handicap discrimination, the EEOC properly investigated only the allegations of race and gender discrimination that she alleged.

In addition, petitioner failed to satisfy the exhaustion requirement because her EEO complaints concerned only the Postal Service's first Notice of Removal. That Notice of Removal was later withdrawn as part of a settlement agreement between petitioner and the Postal Service. Petitioner was discharged as a result of the Postal Service's second Notice of Removal. Petitioner never filed an EEO complaint challenging the second Notice of Removal on any ground.

2. Petitioner contends (Pet. 30) that she has a nonstatutory right to judicial review of her claim of handicap discrimination, regardless of her lack of compliance with the Rehabilitation Act. It is well settled, however, that the Rehabilitation Act provides the exclusive remedy for claims of handicap discrimination brought by federal employees. See, *e.g.*, *Boyd*, 752 F.2d at 413; *McGuinness*, 744 F.2d at 1322.

In any event, even if "nonstatutory review" of petitioner's claim of handicap discrimination were available, it would be "narrowly limited to an inquiry as to whether the Postal Service substantially complied with applicable procedures, whether its actions were arbitrary or capricious, and whether its decision was supported by substantial evidence." Pet. App. A7 (quoting *Neal* v. *United States Postal Serv.*, 468 F. Supp. 958, 961 (N.D. Utah 1979)). The district court reasonably concluded that the Postal Service's actions met that standard of review. Pet. App. B3. Consequently, the result in this case would be no

different if petitioner's claim were subject to non-statutory review.

Finally, the question presented in this case is of no continuing significance. It is now well settled that the Rehabilitation Act provides the exclusive remedy for claims of discrimination based on handicap by federal employees. Cases concerning claims of handicap discrimination arising prior to the 1978 amendments to the Rehabilitation Act are increasingly rare. Accordingly, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1992